Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

ANA BOATWRIGHT,

Petitioner,

v.

ELLIOT D. RAY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), dictates a court in federal habeas proceedings employ a highly deferential standard in evaluating state court rulings. Put bluntly, the AEDPA requires federal courts to give state court decisions "the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

Did the Seventh Circuit exceed its authority under 28 U.S.C. § 2254(d) when it failed to defer to a state court's decision that out-of-court statements were not hearsay and determined that Elliot Ray's confrontation clause rights were violated by the admission of those statements?

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OPINIONS BELOW

The opinion of the court of appeals is reported as *Ray v. Boatwright*, 592 F.3d 793 (7th Cir. 2010) (A1-24). The opinions of the district court are unreported. The decision of the Wisconsin Court of Appeals is unreported (A30-38).

JURISDICTION

The court of appeals entered its decision and final judgment on January 21, 2010 (A13-24, A25). The court entered an amended decision on April 1, 2010 (A1-12). The court entered an order on April 1, 2010, denying the timely petition for rehearing, and an amended order denying the petition for rehearing on April 1, 2010 (A25-28). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which is codified at 28 U.S.C. § 2254, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Facts of the crime and trial.

In March 2000, a group of men, including Ray, decided to go out and shoot some other men with whom they had been arguing (A31). An eleven-year-old girl was killed as a result of the ensuing gunfire (A31). Ray was charged, *inter alia*, as a party to the crime of first-degree reckless homicide (A30).

When Ray was arrested and interviewed by the police, he denied any knowledge of the crime. Eventually, though, Ray told Detective Daniel Phillips that on the night before the girl was killed, Ray and his friends had gotten into a shoot-out with some other men (A34). Ray explained to Phillips that the day following the shoot-out, he and his friends decided that they would go after the men with whom they had been fighting (A31, 34). Ray explained that he grabbed a gun and went with his friends to shoot at the other group of men (A34). Ray stated, though, that as he was walking toward the eventual crime scene, he had a change of heart and turned around, abandoning the plan (A34).

At this point in the interview, Phillips told Ray that two of his friends had told him that Ray was with them at the crime scene. Upon hearing this, Ray told Phillips, "Those stupid niggers shouldn't be talking and they can't talk for me" (A 34). When Phillips then confronted Ray with

statements from his friends regarding what type of weapon Ray was carrying at the scene, Ray told Phillips, "Tell me which gun killed the girl and I'll tell you everything" (A34).

At trial, Ray argued that he had withdrawn from the plan to shoot at the rival group before any shots had been fired (A31-32). The State, however, presented Phillips's testimony regarding Ray's inculpatory statements that were made when he was confronted with his friends' allegations (A34-35). Phillips testified as follows:

> Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> When confronted with statements by Black (Miriam Myles, black male, 5/7/80) that Ray was shooting a nine-millimeter on 29th Street in a statement by Sylvester Townsend, black male, 9/20/73, that Ray had a .45-caliber pistol[,] Ray then said "tell me which gun killed the girls and I'll tell you everything."

> When told by detectives that this information could not be given to him at this time, Ray said he was afraid of "fucking himself" and Ray said he needed some time to think and then would talk to the detectives again.'

(A34-35). Ray did not object to this testimony. Ray was convicted of first-degree reckless homicide (A31).

B. Wisconsin state court decisions.

On direct appeal, Ray argued that his confrontation clause rights had been violated by the admission of Phillips' testimony (A30-38). Because there had been no objection to the testimony at trial, the court of appeals reviewed the claim for "plain error" (A32). The court found that Phillips' testimony did not contain extrajudicial statements admitted for their truth, but contained statements elicited to explain Ray's reaction to hearing those statements (A35). Because the testimony did not contain statements elicited for their truth, the testimony did not contain hearsay (A35). In the absence of a finding of hearsay, the court of appeals found there was no confrontation clause issue and affirmed Ray's conviction (A35). The Wisconsin Supreme Court denied Ray's petition for review.

Ray returned to state court and moved for collateral relief under Wis. Stat. § 974.06, this time

citing his appellate counsel's deficiency for not challenging counsel's performance with regard to Phillips' testimony. The court of appeals denied Ray relief, finding the confrontation clause issue had already been litigated and decided. The Wisconsin Supreme Court again denied Ray's petition for review.

Ray also filed a state petition for a writ of habeas corpus, which was denied.

C. Federal court proceedings.

In February 2007, Ray filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District, as well as a motion to stay proceedings while he returned to state court to exhaust some of his claims. The court granted Ray a stay. When Ray returned to court with his claims exhausted, the district court dismissed Ray's petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court, which provides that a judge may summarily dismiss a petition when it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Nonetheless, the district court granted Ray a certificate of appealability on his confrontation clause claim.

The Seventh Circuit reversed the district court's order and remanded the case to the lower court to grant Ray the habeas relief he sought,

unless Boatwright (hereinafter, "the State") could demonstrate to the district court that the petition was untimely filed under 28 U.S.C. § 2244(d)(1)(A) (A13-24).[1] The court of appeals concluded that Phillips' testimony was hearsay and "was a clear violation of Ray's constitutional right of confrontation" (A19). The court of appeals found the Supreme Court case regarding hearsay on which the state court relied to be "distinguishable" from Ray's case (A19-20). The court then proceeded to find that the testimony did not fall under a recognized hearsay exception and was, therefore, inadmissible (A20-22). Finally, the court analyzed whether the admission of the testimony was "plain error" (A22-23). Finding that it was, the court reversed and remanded the case (A22-23).

The State filed a petition for rehearing and rehearing *en banc*. The State argued that the court of appeals failed to apply the AEDPA to Ray's claim and, instead, appeared to review the claim as if it were before the court on direct review. The State maintained that this appearance was amplified when the court reviewed the admission of the testimony for plain error, a rule of federal criminal procedure applied only on direct review from a federal judgment. *See* Fed. R. Crim. P. 52(b). The

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[1]The State was not afforded an opportunity to respond to Ray's habeas petition in the district court. Thus, the State raised its untimeliness argument for the first time on appeal.

court of appeals ordered Ray to file a response to the State's petition.

The Seventh Circuit then issued an amended decision (A1-12). The amended decision altered two parts of the original decision: (1) the amended decision declared, without citation, that "the hearsay violation is beyond dispute" (A5) and (2) the amended decision employs a harmless error analysis in substitution for the court's previously misplaced plain error analysis (A10). Finding the perceived constitutional violation was not harmless, the court reversed and remanded the case (A10, 12).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition because the Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d) when it granted habeas corpus relief in this case. The Seventh Circuit's decision ignored the mandates of the AEDPA and this Court's decisions in *Renico v. Lett*, 559 U.S. – (2010); *Bell v. Cone*, 535 U.S. 685 (2002), and *Tennessee v. Street*, 471 U.S. 409 (1985). This petition presents this Court with a decision in which a federal appellate court pays mere lip service to the AEDPA and proceeds to decide the issue before it as if that issue were on direct review.

Without deference or discussion, explanation or citation, the Seventh Circuit ruled that contrary to the state court's decision that Phillips' testimony

did not contain hearsay, the "hearsay violation is beyond dispute" (A5) The court then determined that Ray's confrontation clause rights were violated when Phillips' un-objected to testimony was admitted (A6-11).

Here, the Seventh Circuit entirely failed to apply the AEDPA standard to Ray's claim. The decision affords zero deference to the state court decision at issue. In fact, the decision barely refers to the state court decision at all, choosing instead to examine the constitutional claim as if there were no deference due to the state court. Further, the Seventh Circuit decision fails to point to a single "clearly established Federal law, as determined by" this Court to which the state court decision was contrary, or of which it involved an unreasonable application. *See* 28 U.S.C. § 2254(d)(1). Instead, the Seventh Circuit substituted its judgment for the state court's judgment and granted habeas relief.

A. The Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d) when it concluded that Phillips' statements contained hearsay.

As this Court recently restated, the question in federal habeas proceedings is *not* whether the state courts erred or abused their discretion in some way. *Renico v. Lett*, 559 U.S. – (2010) (slip op. at 5). "The question under the AEDPA is instead whether the

determination of the" state court was contrary to, or an unreasonable application of, clearly established federal law. *Id.*

1. The statements were not hearsay.

"Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219 (1974). If a statement is not hearsay, the only bar on its admission is relevance. *Id.* at 221. When a statement is not hearsay, it raises no confrontation clause issue. *See id.* at 219-20.

Here, Phillips' statements that two of Ray's co-actors placed him at the crime scene with a gun was not introduced to prove that Ray was at the crime scene with a gun, but to show Ray's reaction to hearing that his friends had inculpated him in the crime. It was not offered as substantive evidence of Ray's guilt, but to show Ray's behavior upon learning that his friends named him as a participant in the crime. Ray had first denied knowing anything about the shooting, but when he heard that his friends placed him at the scene, he told Phillips, "[T]ell me which gun killed the girls and I'll tell you everything" (A34). Because Phillips' testimony regarding what Ray's friends said was not introduced for its truth, it was not hearsay.

Further, it does not make sense to find that the co-actors' statements were introduced for their

"truth" because the statements were inconsistent with one another. One co-actor placed Ray at the scene with a nine millimeter; the other placed him there with a .45 (A34). The statements were clearly not introduced to show that Ray was at the scene with a nine millimeter and, at the same time, a .45.[2] Instead, they were admitted to show how Ray's behavior and story changed when he was told his friends were naming names. This is a textbook example of the admission of extrajudicial statements for the limited purpose of showing the defendant's highly relevant reaction to those statements.

2. The state court properly concluded that the statements were not hearsay.

In his direct appeal, Ray argued that his confrontation clause rights were violated by the admission of hearsay statements. The State argued that Phillips' testimony was not hearsay and, consequently, did not violate Ray's confrontation clause rights. The state court of appeals found that Ray's claim was similar to the claim presented to this Court in *Tennessee v. Street*, 471 U.S. 409 (1985) (A33). Applying *Street*, the court concluded that

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[2]If one coactor had said Ray had a knife and another said Ray had a club, or one said Ray was there in a black sweatshirt and another said he was there with a green raincoat, it would be "beyond dispute" that the statements were not admitted for their truth.

because Phillips' testimony did not include out-of-court statements offered for their truth, there was no confrontation clause issue (A33-35).

3. The Seventh Circuit, without citation or deference, impermissibly decided the statements were hearsay.

In his habeas petition, Ray raised his confrontation clause claim again. The State asserted that Ray was not entitled to relief because he had not shown that the state court decision rejecting his claim was "contrary to, or an unreasonable application of," *Street* or any other clearly established law from this Court. *See* 28 U.S.C. § 2254(d)(1). Without explanation, citation or deference, the Seventh Circuit ruled that the "hearsay violation is beyond dispute" (A5). Finding that Phillips' testimony contained hearsay, the court proceeded to determine that the introduction of the statements violated Ray's confrontation clause rights (A5-10).

When a state court adjudicates a prisoner's claim on the merits, as the state court did in Ray's case, that decision is entitled to deference. *See* 28 U.S.C. §§ 2254(d)(1) and (2). The prisoner's underlying judgment of conviction is not to be disturbed unless the federal court finds that the state court decision is "contrary to, or any

unreasonable application of, clearly established Federal law, as determined by" this Court or if the decision is "based on an unreasonable determination of the facts in light of the evidence." *Id.*

The Seventh Circuit decision fails to accord the state court decision the requisite deference. The Seventh Circuit's decision fails to adhere to the demand "that state-court decisions be given the benefit of the doubt." *See Visciotti*, 537 U.S. at 24. Nor does the Seventh Circuit's decision point to one single case from this Court to which the state court decision is contrary or of which it is an unreasonable application. This failure marks a clear and improper departure from the mandates of the AEDPA. *See, e.g., Lett*, 559 U.S. – (slip op. at 5-9).

Here, the state court analyzed the facts in Ray's case and found *Street* controlling (A33-35). The state court found, as in *Street*, that the statements at issue were not hearsay so that no confrontation clause issue arose from their admission (A35). The Seventh Circuit, however, concluded that the statements were hearsay. There are two problems with the federal court's conclusion.

First, the Seventh Circuit failed to provide even a modicum of deference to the state court's finding that the testimony did not contain hearsay. The Seventh Circuit decision makes the conclusory statement that the testimony was hearsay without examining the state court's reasoning. The Seventh

Circuit stated that any conclusion contrary to its own shows "lively imagination" (A7).

Whether a state court's determination that evidence is hearsay is a question of fact, a question of law, or a mixed question, it is a determination that is due deference in a federal habeas court. 28 U.S.C. § 2254(d) and (e). The Seventh Circuit's decision wholly ignores the state court's reasoning and ruling and substitutes its own judgment for that of the state court.

Second, the Seventh Circuit decision not only ignores the state court ruling and concludes the hearsay issue is "beyond dispute," but it fails to show how the state court decision was contrary to, or an unreasonable application of, clearly established federal law. The decision points to not one case of this Court of which the state court ran afoul.

The Seventh Circuit clearly exceeded its authority in determining that Phillips' testimony contained hearsay. The Seventh Circuit must provide deference to the state court's decision that the statements were elicited not for their truth, but to demonstrate Ray's inculpatory reaction to hearing the statements. Should the Seventh Circuit find a state court decision to be contrary to, or an unreasonable application of, some clearly established federal law, it must set forth its reasoning and conclusions in its decision in order to provide the state courts guidance for future cases.

B. The Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d)(1) by failing to show how the state court's decision applying *Street* was contrary to that decision or an unreasonable application of that decision.

The Seventh Circuit described the State's argument that Phillips' testimony was not elicited for its truth as a "cleverly presented" argument and stated that such an argument "shows lively imagination" (A7). The Seventh Circuit failed, however, to show how the state court's argument is contrary to, or an unreasonable application of, clearly established Supreme Court law.

Finding *Street* controlling, the state court concluded Phillips' testimony did not include hearsay (A33-35). In *Street*, this Court rejected a petitioner's complaint that his confrontation clause rights had been violated when his non-testifying co-actor's extrajudicial statements were admitted at trial. *Street*, 471 U.S. 409 (1985). This Court concluded that the co-actor's confession – implicating the petitioner – "was *not* hearsay under traditional rules of evidence" because it was not used "to prove the truth" of the assertions in the confession. *Id.* at 413. "The *nonhearsay* aspect of [the coactor]'s confession – not to prove what happened at the crime scene but to prove what happened when respondent confessed – raises no Confrontation Clause concerns." *Id.* at 414.

The Seventh Circuit, however, found *Street* "distinguishable" from Ray's case (A7-8) Such a finding has no relevance in a case that must be analyzed under the deferential standards set forth in the AEDPA. To grant relief, the court must point to a Supreme Court case to which the state court decision was contrary or of which it was an unreasonable application. The Seventh Circuit decision did not find that the state court decision is contrary to, or an unreasonable application of, *Street*. Even if *Street* is "distinguishable," the Seventh Circuit did not show how the state court's decision applying it is "at such tension with governing Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue." *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997).

The Seventh Circuit's decision in this case wholly ignores the instructions of the AEDPA and the law of this Court. The Seventh Circuit far exceeded its authority in granting Ray habeas relief because it found *Street* "distinguishable." Without a finding that the state court's decision was contrary to, or an unreasonable application of, clearly established law from this Court, the Seventh Circuit had no authority to grant relief.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 1:07-cv-00190-WGC-**William C. Griesbach**,
Judge

ARGUED NOVEMBER 5, 2009
DECIDED JANUARY 21, 2010
AMENDED APRIL 1, 2010

Before BAUER, MANION and WILLIAMS,
Circuit Judges.

BAUER, *Circuit Judge*. Elliot Ray appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Because it

was error for the state court to admit the co-actors' statements through the police detective's testimony at trial, violating Ray's right of confrontation, we reverse and remand.

I. BACKGROUND

Ray was one of several gunmen charged in Wisconsin state court for a retaliatory shooting in which Rita Martinez, an eleven-year-old girl, was killed, and two people were injured on 29th Street in Milwaukee, Wisconsin. Ray claims that on the night of the shooting, he changed his mind about accompanying his friends to 29th Street, told his friends that he was not going with them, and returned to his friend's house on 33rd Street. Ray maintains that he learned that Martinez had been shot near 29th Street from a television news report.

At trial, the State called Detective Daniel Phillips to testify about the homicide investigation and his interview with Ray at the police station. The detective testified about Ray's signed statement that was written toward the end of Ray's interview, where Ray talked about the night of shootings at issue, as well as the events that transpired the night before the shootings. Ray's App. at 642. In testifying, the detective primarily read from Ray's statement, including the portion where he told Ray that two of his co-actors' had made statements to implicate Ray in the shootings. We note that the detective testifying to the statements made by others is inadmissible hearsay. The detective testified as follows:

> Ray states that he too then began walking from 33rd Street to 29th Street to go shoot along with the rest of them, but Ray states when he got to North Avenue he thought "fuck it" and turned around and went back to [his friend's] house.
>
> Ray was then confronted with numerous statements made by co-actors that they were present shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> *When confronted with statements by [Miriam Myles] that Ray was shooting a nine-millimeter on 29th Street [and] in a statement by Sylvester Townsend . . . that Ray had a .45-caliber pistol[,]* Ray then said "tell me which gun killed the girl and I'll tell you everything."

Ray's App. at 653. (Emphasis added.)

Ray's attorney did not object to the detective's testimony regarding the above-referenced statements. Neither Miriam Myles nor Sylvester Townsend testified at trial.

A jury returned guilty verdicts for one count of first-degree reckless homicide, party to a crime, and two counts of first-degree recklessly endangering safety. Ray's App. at 38. He was also convicted of being a felon in possession of a firearm. *Id.*

On direct appeal, Ray raised five issues, including a claim that his confrontation clause rights

were violated when the detective was allowed to testify regarding statements made by Ray's co-actors, when those co-actors were not witnesses at trial. The state appellate court ignored this issue and solely focused on whether there was a hearsay violation, despite the detective using the phrase, "Ray was then confronted" in his testimony. The state appellate court concluded that the detective's references to the co-actors' statements were not hearsay because they were not offered to prove "the truth of the matter" contained in the statements but rather "to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun—a reaction implicating him in the revenge-seeking conspiracy." Ray's App. at 40-42. The state supreme court denied Ray's petition for review.

Ray then sought post-conviction relief in state court under Wis. Stat. § 974.06. He was denied relief. Ray's App. at 95.

Ray filed two separate pro se petitions for writ of habeas corpus in the federal district court. The district court denied both of Ray's petitions pursuant to Rule 4 of the Rules Governing Section 2254 Cases, finding that he set forth no cognizable constitutional or federal law claims. Ray's App. at 51-58, 94-100. Thereafter, the district court granted Ray's request for a certificate of appealability to address whether the trial court's admission of the statements by non-testifying co-actors through the testimony of the detective ran afoul of the confrontation clause.

II. DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an application for a writ of habeas corpus may not be granted unless adjudication of the claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[S]tate-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." *Williams v. Taylor,* 529 U.S. 362, 388 (2000).

The Government seeks to frame the issue in this case as one involving the hearsay rule; it is not. As noted above, the hearsay violation is beyond dispute. The issue, then, involves the violation of the Sixth Amendment of the Constitution which says that: "The accused shall enjoy the right . . . to be confronted with the witnesses against him. The Supreme Court has held that the guarantee, which is extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses. *See Pointer v. Texas,* 380 U.S. 400, 404 (1965). And this fundamental constitutional right is quite properly an almost total ban on the introduction of accusations against the accused by persons not present for cross-examination.

A. Whether There Was A Confrontation Clause Issue

The first issue we must address is whether the detective's testimony concerning the statements made by the co-actors violated Ray's right of confrontation. The government contends that the co-actors' statements were used "not as substantive evidence of Ray's guilt, but instead to 'give the context of' Ray's reaction to those statements." Appellee's Brief at 22. Because the statements were not hearsay, the government maintains that they do not run afoul of the confrontation clause. *Id.* at 23. The government likens this case to both *Tennessee v. Street,* 471 U.S. 409, 417 (1985) and *Lee v. McCaughtry,* 892 F.3d 1318, 1325 (7th Cir. 1990). In *Street,* the Supreme Court held that there was no confrontation clause violation when the State introduced the co-actor's confession, because it was introduced for the non-hearsay purpose of rebutting the defendant's testimony that his own confession was a coerced "copy" of the co-actor's statement. 471 U.S. at 417. In *Lee,* we held that there was no confrontation clause violation in admitting into evidence a tape recording that included the state's attorney's narration of the accomplice's accusation in the recorded interview with the defendant, because it was used to place into context for the jury the metamorphosis of the defendant's accounts of events, i.e., that the defendant changed his story after hearing the accomplice's accusation. 892 F.3d at 1325.

The government maintains that the state court's conclusion that the co-actors' statements were

introduced to give context to Ray's reaction to them (i.e., a guilty reaction), not to show their underlying truth, is a reasonable conclusion and a reasonable application of federal law. *Id.* at 24.

We disagree. The confrontation clause has been invoked to prevent, even in a joint trial, the admission of a confession by a co-defendant that implicates the other accused, even if the trial judge provides a limiting instruction. *See Bruton v. United States,* 391 U.S. 123, 127-28 (1968). While the method of presentation of the accusations in this case shows lively imagination on the part of the prosecution, it nevertheless runs afoul of the United States Constitution. Here, the evidence presented by the prosecution delivered to the jury statements by named co-actors, not available for cross-examination, accusing Ray of the very crimes with which he stood charged. However cleverly presented, the evidence was a clear violation of Ray's constitutional right of confrontation. While the government asserts that "a number of witnesses placed Ray among the group of people involved in the shooting" (Appellee's Brief at 5-6), none of these witnesses could place Ray at the scene of the shootings, with a weapon in his hand. To accept the government's position that the statements were offered only to create the setting for Ray's response, and therefore admissible, would set the stage to eliminate, in most cases, the confrontation right "enjoyed by the accused."

Street is factually distinguishable because there, the co-actor's confession was introduced in rebuttal to refute the defendant's claim of coercion, where here, the detective testified to the co-actors'

statements during the State's case-in-chief. The court in *Street* also instructed the jury that the co-actor's statement was to "be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." *Id.* at 412. The court in this case issued no limiting instruction.

Lee is also distinguishable because we do not find that Ray changed his version of events after hearing the accusations of the co-actors. Further, the trial court in *Lee* also provided a limiting instruction whereas none was provided here.

We find that the detective testifying to the co-actors' statements proved far more than any reaction that Ray had during his interview. Ray did not have the opportunity to cross-examine these co-actors at trial. Accordingly, these statements violated Ray's right of confrontation.

B. Whether These Statements Were Admissible Under *Roberts* And *Lilly*

Because Ray's conviction was finalized before *Crawford v. Washington*, 541 U.S. 36 (2004), was decided, Ray's confrontation clause claim should be analyzed "according to *Roberts* and *Lilly*, the clearly established Supreme Court at the time of the state court decisions." *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005). Under these cases, the veracity of statements from non-testifying witnesses is sufficiently dependable to allow the untested admission of such statements against an accused at trial when (1) "the evidence falls within a firmly

rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980); *Lilly v. Virginia,* 527 U.S. 116, 124-25 (1999).

The government does not argue, nor do we find, that these statements fall within a hearsay exception.

Additionally, the government does not argue that these statements contain particularized guarantees of trust- worthiness. As this Court interprets the reasoning of the plurality in *Lilly,* these guarantees of trustworthiness "must be inherent in the circumstances of the testimony itself; the fact that other evidence corroborates the testimony in question does not suffice." *United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000). There is a presumption of unreliability that attaches to a co-defendant's confession, see *Lee v. Illinois,* 476 U.S. 530, 543, (1986), "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when . . . the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." *Lilly,* 527 U.S. at 137.

Here, the co-actor's statements neither fall "within a firmly rooted hearsay exception," nor do they contain "particularized guarantees of trustworthiness." Therefore, these statements were

inadmissible. *See Roberts,* 448 U.S. at 65-66; *Lilly,* 527 U.S. at 124-25.

C. Whether It Was Harmless Error To Admit These Statements

We have concluded that the hearsay statements were inadmissible. The state does not contend that Ray failed to exhaust his state remedies or procedurally defaulted his constitutional arguments. Accordingly, these arguments are waived. *Lilly v. Gilmore,* 988 F.2d 783, 784-85 (7th Cir. 1993). We must now determine whether the error in admitting these statements was harmless or whether it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993).

In this case, the error in admitting these statements was not harmless. Ray was not able to cross-examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the conspiracy at issue. We find this confrontation clause violation seriously affected the fairness of the judicial proceedings, resulted in a decision that was contrary to clearly established federal law, and reverse the district court's opinion.

D. Whether Ray's Petition Was Timely

The government alternatively argues that Ray's habeas petition should be barred because it was untimely. Under the rules governing AEDPA, a

petitioner has one year in which to file a petition for writ of habeas corpus, to begin running "on the date of which the judgment became final by the conclusion of direct review or expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(I)(A).

The one-year period is tolled during a properly filed post-conviction petition in state court. *See* 28 U.S.C. § 2244(d)(2). Accordingly, Ray had until September 9, 2004 in which to file his petition. The government maintains that Ray failed to provide documentation that he had originally filed his state post-conviction motion in a timely manner, and discredits Ray's assertion that the Oklahoma prison in which he was housed misplaced the timely-filed motion.

There is no evidence in the record to support the government's assertions. However, this is largely due to the fact that the district court dismissed Ray's petition on the merits before giving the government an opportunity to answer the petition and develop the record. The record currently reflects that Ray served a copy of his pro se post-conviction petition to prison officials on April 27, 2004. Ray's App. at 32, 36. Correspondence between Ray and prison officials alternatively indicate that Ray filed his motion on April 29, 2004. Ray's App. at 32, 34-35, 37. Despite the disparity in the date, these documents provide support for Ray's assertion that he filed his post-conviction petition in a timely manner. However, the government has not yet had a chance to challenge whether the documents Ray placed into the record are authentic; whether the state court petition was ever received by prison officials; whether the papers

Ray filed were sufficient under state law to petition for post-conviction relief, or whether the individual to whom Ray allegedly gave his petition was a proper prison authority. Accordingly, we remand this case to the district court so that the government may have an opportunity to develop the record on this issue. If, after the record is fully developed, Ray's petition is determined to be timely, this Court directs the district court to grant the petition for writ of habeas corpus unless the State chooses to retry Ray within 120 days.

III. CONCLUSION

For the reasons stated above, we REVERSE the district court and REMAND the case for further proceedings not inconsistent with this opinion.

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WGC
William C. Griesbach, *Judge*

ARGUED NOVEMBER 5, 2009
DECIDED JANUARY 21, 2010

Before BAUER, MANION and WILLIAMS,
Circuit Judges.

BAUER, *Circuit Judge.* Elliot Ray appeals from the district court's denial of his petition for a writ of

habeas corpus under 28 U.S.C. § 2254. Because it was plain error for the state court to admit the co-actors' statements through the police detective's testimony at trial, violating Ray's right of confrontation, we reverse and remand.

I. BACKGROUND

Ray was one of several gunmen charged in Wisconsin state court for a retaliatory shooting in which Rita Martinez, an eleven-year-old girl, was killed, and two people were injured on 29th Street in Milwaukee, Wisconsin. Ray claims that on the night of the shooting, he changed his mind about accompanying his friends to 29th Street, told his friends that he was not going with them, and returned to his friend's house on 33rd Street. Ray maintains that he learned that Martinez had been shot near 29th Street from a television news report.

At trial, the State called Detective Daniel Phillips to testify about the homicide investigation and his interview with Ray at the police station. The detective testified about Ray's signed statement that was written toward the end of Ray's interview, where Ray talked about the night of shootings at issue, as well as the events that transpired the night before the shootings. Ray's App. at 642. In testifying, the detective primarily read from Ray's statement, including the portion where he told Ray that two of his co-actors' had made statements to implicate Ray in the shootings. We note that the detective testifying to the statements made by others (other than the defendant) is inadmissible hearsay. The detective testified as follows:

> Ray states that he too then began walking from 33rd Street to 29th Street to go shoot along with the rest of them, but Ray states when he got to North Avenue he thought "fuck it" and turned around and went back to [his friend's] house.
>
> Ray was then confronted with numerous statements made by co-actors that they were present shooting on 29th Street and so was Ray.

Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."

When confronted with statements by [Miriam Myles] that Ray was shooting a nine millimeter on 29th Street [and] in a statement by Sylvester Townsend . . . that Ray had a .45-caliber pistol[,] Ray then said "tell me which gun killed the girl and I'll tell you everything."

Ray's App. at 653. (Emphasis added.)

Ray's attorney did not object to the detective's testimony regarding the above-referenced statements. Neither Miriam Myles nor Sylvester Townsend testified at trial.

A jury returned guilty verdicts for one count of first-degree reckless homicide, party to a crime, and two counts of first-degree recklessly endangering safety. Ray's App. at 38. He was also convicted of being a felon in possession of a firearm. *Id.*

On direct appeal, Ray raised five issues, including a claim that his confrontation clause rights were violated when the detective was allowed to testify regarding statements made by Ray's co-actors, when those co-actors were not witnesses at trial. The state appellate court ignored this issue and solely focused on whether there was a hearsay violation, despite the detective using the phrase, "Ray was then confronted" in his testimony. The state appellate court concluded that the detective's references to the co-actors' statements were not hearsay because they were not offered to prove "the truth of the matter" contained in the statements but rather "to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun-a reaction implicating him in the revenge-seeking conspiracy." Ray's App. at 40-42. The state supreme court denied Ray's petition for review.

Ray then sought post-conviction relief in state court under Wis. Stat. § 974.06. He was denied relief. Ray's App. at 95.

Ray filed two separate pro se petitions for writ of habeas corpus in the federal district court. The district court denied both of Ray's petitions pursuant to Rule 4 of the Rules Governing Section 2254 Cases, finding that he set forth no cognizable constitutional or federal law claims. Ray's App. at 51-58, 94-100. Thereafter, the district court granted Ray's request for a certificate of appealability to address whether the trial court's admission of the statements by non-testifying co-actors through the testimony of the detective ran afoul of the confrontation clause.

II. DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an application for a writ of habeas corpus may not be granted unless adjudication of the claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[S]tate-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." *Williams v. Taylor,* 529 U.S. 362, 388 (2000).

The Government seeks to frame the issue in this case as one involving the hearsay rule; it is not. While there is a hearsay violation as noted above, the issue involves the violation of the Sixth Amendment of the Constitution which says that: "The accused shall enjoy the right . . . to be confronted with the witnesses against him The Supreme Court has held that the guarantee, which is extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses. *See Pointer v. Texas,* 380 U.S. 400, 404 (1965). And this fundamental constitutional right is quite properly an almost total ban on the introduction of accusations against the accused by persons not present for cross-examination.

A. Whether There Was A Confrontation Clause Issue

The first issue we must address is whether the detective's testimony concerning the statements made by the co-actors violated Ray's right of confrontation. The government contends that the co-actors' statements were used "not as substantive evidence of Ray's guilt, but instead to 'give the context of' Ray's reaction to those statements." Appellee's Brief at 22. Because the statements were not hearsay, the government maintains that they do not run afoul of the confrontation clause. *Id.* at 23. The government likens this case to both *Tennessee v. Street*, 471 U.S. 409, 417 (1985) and *Lee v. McCaughtry*, 892 F.3d 1318, 1325 (7th Cir. 1990). In *Street*, the Supreme Court held that there was no confrontation clause violation when the State introduced the co-actor's confession, because it was introduced for the non-hearsay purpose of rebutting the defendant's testimony that his own confession was a coerced "copy" of the co-actor's statement. 471 U.S. at 417. In *Lee*, we held that there was no confrontation clause violation in admitting into evidence a tape recording that included the state's attorney's narration of the accomplice's accusation in the recorded interview with the defendant, because it was used to place into context for the jury the metamorphosis of the defendant's accounts of events, i.e., that the defendant changed his story after hearing the accomplice's accusation. 892 F.3d at 1325.

The government maintains that the state court's conclusion that the co-actors' statements were

introduced to give context to Ray's reaction to them (i.e., a guilty reaction), not to show their underlying truth, is a reasonable conclusion and a reasonable application of federal law. *Id.* at 24.

We disagree. The confrontation clause has been invoked to prevent, even in a joint trial, the admission of a confession by a co-defendant that implicates the other accused, even if the trial judge provides a limiting instruction. *See Bruton v. United States*, 391 U.S. 123, 127-28 (1968). While the method of presentation of the accusations in this case shows lively imagination on the part of the prosecution, it nevertheless runs afoul of the United States Constitution. Here, the evidence presented by the prosecution delivered to the jury statements by named co-actors, not available for cross-examination, accusing Ray of the very crimes with which he stood charged. However cleverly presented, the evidence was a clear violation of Ray's constitutional right of confrontation. While the government asserts that "a number of witnesses placed Ray among the group of people involved in the shooting" (Appellee's Brief at 5-6), none of these witnesses could place Ray at the scene of the shootings, with a weapon in his hand. To accept the government's position that the statements were offered only to create the setting for Ray's response, and therefore admissible, would set the stage to eliminate, in most cases, the confrontation right "enjoyed by the accused."

Street is factually distinguishable because there, the co-actors' confession was introduced in rebuttal to refute the defendant's claim of coercion, where

here, the detective testified to the co-actors' statements during the State's case-in-chief. The court in *Street* also instructed the jury that the co-actor's statement was to "be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." *Id.* at 512. The court in this case issued no limiting instruction.

Lee is also distinguishable because we do not find that Ray changed his version of events after hearing the accusations of the co-actors. Further, the trial court in *Lee* also provided a limiting instruction whereas none was provided here.

We find that the detective testifying to the co-actors' statements proved far more than any reaction that Ray had during his interview. Ray did not have the opportunity to cross-examine these co-actors at trial. Accordingly, these statements violated Ray's right of confrontation.

B. Whether These Statements Were Admissible Under *Roberts* And *Lilly*

Because Ray's conviction was finalized before *Crawford v. Washington*, 541 U.S. 36 (2004), was decided, Ray's confrontation clause claim should be analyzed "according *to Roberts* and *Lilly*, the clearly established Supreme Court precedent at the time of the state court decisions." *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005). Under these cases, the veracity of statements from non-testifying witnesses is sufficiently dependable to allow the untested admission of such statements against an

accused at trial when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980); *Lilly v. Virginia,* 527 U.S. 116, 124-25 (1999).

The government does not argue, nor do we find, that these statements fall within a hearsay exception.

Additionally, the government does not argue that these statements contain particularized guarantees of trustworthiness. As this Court interprets the reasoning of the plurality in *Lilly,* these guarantees of trustworthiness "must be inherent in the circumstances of the testimony itself; the fact that other evidence corroborates the testimony in question does not suffice." *United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000). There is a presumption of unreliability that attaches to a co-defendant's confession, see *Lee v. Illinois,* 476 U.S. 530, 543 (1986), "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when . . . the government is involved in the statements' production and when the statements describe past events and have not been subjected to adversarial testing." *Lilly,* 527 U.S. at 137.

Here, the co-actor's statements neither fall "within a firmly rooted hearsay exception", nor do they contain "particularized guarantees of

trustworthiness." Therefore, these statements were inadmissible. *See Ohio v. Roberts,* 448 U.S. at 65-66; *Lilly,* 527 U.S. at 124-25.

C. Whether It Was Plain Error To Admit These Statements

Ray concedes that no objection was made when the detective testified to the co-actors' statements and that, as a consequence, our review is limited to plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Hodges,* 315 F.3d 794, 800 (7th Cir. 2003). Under the plain error standard, "we must decide (1) whether there was an error at all, (2) whether it was plain, (3) whether it affected the defendant's substantial rights, and (4) whether (if the first three factors are present) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Hawk*, 434 F.3d 959, 962, (7th Cir. 2006). The focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. *Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986). A new trial is warranted if the error had a substantial and injurious effect or influence on determining the jury verdict. *Bintz,* 403 F.3d at 869.

Here, the error in admitting statements by non-testifying co-actors was plain. Ray's substantial rights were affected because he was not able to cross-examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the

conspiracy at issue. We find this confrontation clause violation seriously affected the fairness of the judicial proceedings and reverse the district court's opinion.

D. Whether Ray's Petition Was Timely

The government alternatively argues that Ray's habeas petition should be barred because it was untimely. Under the rules governing AEDPA, a petitioner has one year in which to file a petition for writ of habeas corpus, to begin running "on the date of which the judgment became final by the conclusion of direct review or expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The one-year period is tolled during a properly filed post-conviction petition in state court. *See* 28 U.S.C. § 2244(d)(2). Accordingly, Ray had until September 9, 2004 in which to file his petition. The government maintain that Ray failed to provide documentation that he had originally filed his state post-conviction motion in a timely manner, and discredits Ray's assertion that the Oklahoma prison in which he was housed misplaced the timely-filed motion.

There is no evidence in the record to support the government's assertions. However, this is largely due to the fact that the district court dismissed Ray's petition on the merits before giving the government an opportunity to answer the petition and develop the record. The record currently reflects that Ray served a copy of his pro se post-conviction petition to prison officials on April 27, 2004. Ray's App. at 32, 36. Correspondence between Ray and prison officials alternatively indicate that Ray filed his motion on

April 29, 2004. Ray's App. at 32, 34-35,37. Despite the disparity in the date, these documents provide support for Ray's assertion that he filed his post-conviction petition in a timely manner. However, the government has not yet had a chance to challenge whether the documents Ray placed into the record are authentic; whether the state court petition was ever received by prison officials; whether the papers Ray filed were sufficient under state law to petition for post-conviction relief; or whether the individual to whom Ray allegedly gave his petition was a proper prison authority. Accordingly, we remand this case to the district court so that the government may have an opportunity to develop the record on this issue. If, after the record is fully developed, Ray's petition is determined to be timely, this Court directs the district court to grant the petition for writ of habeas corpus unless the State chooses to retry Ray within 120 days.

III. CONCLUSION

For the reasons stated above, we REVERSE the district court and REMAND the case for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 21, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant,

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the District Court for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WCG
William C. Griesbach, *Judge.*

The judgment of the Distric Court is **REVESED** and the case is **REMANDED** in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant,

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the District Court for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WCG
William C. Griesbach, *Judge.*

AMENDED ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed in the above-captioned case

by respondent-appellee on February 3, 2010, and the response filed by petitioner-appellant on February 18, 2010, no judge in active service has requested a vote on the petition for rehearing *en banc*[1] and all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, **ORDERED** that the petition for rehearing and rehearing *en banc* is DENIED.

IT IS FURTHER ORDERED that this court's opinion dated January 21, 2010, is amended in a separately filed opinion released today.

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[1]Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant,

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the District Court for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WCG
William C. Griesbach, *Judge.*

O R D E R

On consideration of the petition for rehearing and rehearing *en banc* filed in the above-captioned case

by respondent-appellee on February 3, 2010, and the response filed by petitioner-appellant on February 18, 2010, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, **ORDERED** that the petition for rehearing and rehearing *en banc* is DENIED.

IT IS FURTHER ORDERED that this court's opinion dated January 21, 2010, is amended in a separately filed opinion released today.

COURT OF APPEALS
DECISION
DATED AND FILED
January 28, 2003

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2002AP0791-CR Cir. Ct. No. 00CF1684

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent,
V.

ELLIOT D. RAY,
Defendant-Appellant.

APPEAL from order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Elliot D. Ray, appeals from a judgment of conviction, following his jury trial, for first-degree reckless homicide, party to a crime, two counts of first-degree recklessly endangering safety, party to a crime and possession of a firearm by felon. He argues that: (1) his confrontation rights were

violated by the admission of the statements of non-testifying co-actors; (2) the court erred in denying his mistrial motion based on the State's reference to his felony record; and (3) he was sentenced based on inaccurate information. We affirm.

I. BACKGROUND

¶2 Ray was one of several gunmen involved in a March 25, 2000 retaliation shoot-out on North 29th Street, which injured Tenifa Jones and Jermaine Savage and killed eleven-year-old Rita Martinez. Trial evidence established that on the night before the deadly shoot-out, Ray and his friends were involved in another shooting outside Alex's Tavern on 30th and Brown Streets. Ray told police that he and a group of friends exchanged gunfire with another group of men after Ray's friend, Jonathan Booth, had an altercation with a patron from the tavern. Ray testified that the next day, he and several of his friends were at Sylvester Townsend's residence discussing the incident when they decided to "'F' them niggers . . . and go down there on 29th and get them . . ." The men then gathered their guns and headed toward North Avenue. Ray testified that when he arrived at North Avenue, he "just turned around like, Fuck it, I ain't going." He noted that as he turned around, two of the other men he was with called him names, implying that he was afraid. Ray said he returned to Townsend's house and, shortly thereafter, learned from a television news report that a child had been shot in the vicinity of 29th Street.

¶3 At trial, Ray claimed that he had withdrawn from the conspiracy to seek revenge and, therefore, was not guilty. To rebut his claim, the State introduced his statement to police, in which Ray, reacting to his co-actor's statements implicating him in the shooting, offered to tell the police everything if they first told him which gun killed Martinez. The jury rejected Ray's defense and found him guilty of the charges.

II. ANALYSIS

¶4 Ray first argues that his constitutional rights were violated when a police detective, testifying at his trial, referred to confessions of non-testifying co-actors. Ray concedes that he is not entitled to have his challenge reviewed as a matter of right, given that he did not object at trial. He argues, however, that the admission of such consequential hearsay constituted plain error requiring reversal of his convictions. See WIS. STAT. § 901.03(4).[1] We disagree.

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[1]WISCONSIN STAT. § 901.03(4) (1999-2000), provides: "PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge. A plain error is one that is both obvious and substantial or grave, and the rule is reserved for cases where there is the likelihood that the error has denied a defendant a basic constitutional right. State v. Vinson, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

¶5 To obtain relief under the plain error doctrine, a defendant must first establish that a constitutional error occurred at trial and that the error was clear or obvious. ***State v. Frank,*** 2002 WI App 31, ¶25, 250 Wis. 2d 95, 640 N.W.2d 198. A defendant's constitutional right to confrontation may be violated if a co-actor's confession is admitted at trial as substantive evidence of the defendant's guilt, the co-actor does not testify at trial, and the co-actor's confession is not sufficiently reliable to warrant its uncross-examined admission into evidence against the defendant. ***Lee v. Illinois,*** 476 U.S. 530, 539-46 (1986). No violation occurs, however, if the co-actor's statement was not introduced as substantive evidence to prove the truth of the co-actor's assertions. ***Tennessee v. Street,*** 471 U.S. 409, 413-14 (1985). Further, an out-of-court statement is hearsay only if it is offered to show the truth of the matters asserted in the statement. *See* WIS. STAT. § 908.01(3) (1999-2000) ("'Hearsay' is a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted.").[2] If the statement is offered only to prove that the statement was made, a confrontation issue does not arise. *See State v.* ***Curbello-Rodriguez,*** 119 Wis. 2d 414, 426-27, 430, 351 N.W.2d 758 (Ct. App. 1984). A statement is not hearsay, and does not implicate the Confrontation Clause, if it is offered, not for its truth, but to explain the prior, concurrent or

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[2]All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

subsequent conduct of another person. *See* ***id.*** at 430; *see also* ***State v. Adams,*** 221 Wis. 2d 1, 14-15, 584 N.W.2d 695 (Ct. App. 1998).

¶6 The State elicited testimony from Detective Daniel Phillips who related Ray's entire statement, including those portions in which he responded to what Phillips told him were two of his co-conspirators' statements implicating him in the shooting. Detective Phillips testified that, during the police interview, Ray said he took a gun and started walking toward 29th Street with the others to shoot at a rival group, but that he turned back before they reached their destination; that he was not present and did not participate when the shoot-out occurred. Detective Phillips then read Ray's statement:

> Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> When confronted with statements by Black (Miriam Myles, black male, 5/7/80) that Ray was shooting nine-millimeter on 29th Street in a statement by Sylvester Townsend, black male 9/20/73, that Ray had a .45-caliber pistol[,] Ray then said "tell me which gun killed the girls and I'll tell you everything."

> When told by detectives that this information could not be given to him at this time, Ray said he was afraid of "fucking himself" and Ray said he needed some time to think and then would talk to the detectives again.

¶7 Ray maintains that the inclusion of his co-actors' statements constituted plain error. We disagree. Here, the detective's references to the co-actors' statements were not offered to prove the "truth of the matter" contained in the statements, *see* WIS. STAT. § 908.01(3), but rather, to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun—a reaction implicating him in the revenge-seeking conspiracy. Clearly, therefore, the statements were not hearsay and Ray is not entitled to reversal based on plain error.

¶8 Ray next argues that the court erred in denying his motion for a mistrial after the State inadvertently referred to him as a felon in possession of a firearm during its closing argument. We disagree.

¶9 The decision to declare a mistrial is within the sound discretion of the trial court. ***State v. Copening***, 100 Wis. 2d 700, 710, 303 N.W.2d 821 (1981). Our review is limited to whether the trial court erroneously exercised discretion in refusing to declare a mistrial. ***State v. Pankow***, 144 Wis. 2nd 23, 47, 422 N.W.2d 913 (Ct. App. 1988). A trial court properly exercises discretion when it examines the relevant facts, applies the proper standard of law,

and engages in a rational decision-making process. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). A misstatement in a prosecutor's closing argument does not justify relief unless the misstatement, viewed in the context of the entire case, so infected the trial with unfairness that the defendant was denied the right to a fair trial. ***State v. Wolff***, 171 Wis. 2d 161, 166-68, 491 N.W.2d 498 (Ct. App. 1992).

¶10 Prior to trial, the parties agreed that the State would refer to Ray as a "prohibited person," rather than a "felon," for purposes of prosecuting the felon-in-possession-of-firearm charge. Ray stipulated to the status element of the offense and, pursuant to the parties' agreement, the jury was instructed: "The defendant had been prohibited from possessing a firearm on March 24, 2000. The parties have agreed that the defendant was prohibited from possessing a firearm on March 24, 2000, and you must accept this as conclusively proven."

¶11 During closing arguments, the prosecutor, explaining his perception of Ray's trial strategy, stated that Ray was trying to establish that the police were "pin[ning] this on [him]" and that, as part of his strategy, Ray was admitting to possession a gun, hoping that the jury would compromise and convict him of that charge but not the others. While commenting on this strategy the prosecutor misspoke, stating: "[I]t's a good strategy. It's a good bill of goods, if you will, to admit to that felon in possession – the prohibited person in possession of a firearm charge." The defense immediately requested a sidebar and subsequently requested a mistrial.

Denying Ray's request, the court commented that it was not even sure the jurors had heard the slip-of-the-tongue, and concluded that any error was insignificant in light of the entire proceeding. We agree.

¶12 Even if the jury did hear the comment, the content of the slip was inconsequential. Ray's trial lasted several days. The prosecutor's inadvertent use of "felon" instead of "prohibited person," which was immediately corrected, consisted of one word in a lengthy closing argument. It involved the one crime for which Ray admitted guilt.

¶13 Moreover, notwithstanding the stipulation, a defendant's felony status may be revealed to the jury. *See* ***State v. Nicholson***, 160 Wis. 2d 803, 807, 467 N.W.2d 139 (Ct. App. 1991) (It is not reversible error for the "trial court to permit the revelation to the jury of the defendant's felon status. Reversible error would only arise when the nature of that felony were revealed to the jury despite the offer to stipulate.") Indeed, under the jury instructions, the jury is informed that "the parties have agreed that the defendant was convicted of a felony. . . ." WIS JI-CRIMINAL 1342 (2000). The trial court did not err in denying Ray's request for a mistrial.

¶14 Finally, Ray argues that he was sentenced base on inaccurate information – that all the other witnesses and defendants placed him at the scene as one of the shooters. We need not address the merits of his argument, however, because Ray failed to move the trial court for resentencing. *See* ***State v. Chambers***, 173 Wis. 2d 237, 261, 496 N.W.2d 191

(Ct. App. 1989) (This court will not review a sentence on appeal if the defendant failed to move for sentence modification under WIS. STATE. RULE 809.30).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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Supreme Court, U.S.
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No. 10-31

In the Supreme Court of the United States

ANA BOATWRIGHT, PETITIONER

v.

ELLIOT D. RAY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly applied *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and *Lilly* v. *Virginia*, 527 U.S. 116 (1999), to this pre-*Crawford* case, where out of court statements of co-actors were introduced in a criminal trial without an opportunity to cross-examine them—and where those statements were the only evidence placing Ray with a gun at the scene of the crime.

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INTRODUCTION

Petitioner seeks review of the Seventh Circuit's straightforward application of the clearly established law of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and *Lilly* v. *Virginia*, 527 U.S. 116 (1999), to the unique facts of this case.[1] In doing so, Petitioner fails to articulate, much less satisfy, this Court's criteria for certiorari. See Rule 10. First, the petition fails to identify any conflict among the lower courts concerning the question presented. There is none. Second, even if the lower courts could somehow disagree about how to resolve the question presented, it would be of little consequence. *Roberts* and *Lilly* have both been superseded by this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and this case is one of only a handful of pre-*Crawford* cases still pending on collateral review. Thus, far from raising any important or recurring question of law, certiorari would serve only to reexamine a dead doctrine. Third, although Petitioner urges this Court to grant certiorari merely to correct error, that argument would not support certiorari even if it were correct—and it is not. Only by mischaracterizing both the decision below and the record can Petitioner portray the decision as contrary to AEDPA. For example, Petitioner's principal claim—that the ruling below conflicts with *Tennessee* v. *Street*, 471 U.S. 409

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[1] Because Ray's conviction was finalized before this Court decided *Crawford*, Ray's Confrontation Clause claims were properly analyzed "according to *Roberts* and *Lilly*, the clearly established Supreme Court precedent at the time of the state court decisions." *Bintz* v. *Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005). See also *Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007) (holding that *Crawford* did not apply retroactively).

(1985)—ignores the critical differences between this case and *Street*, as well as the fact that the statements here were not subject to any limiting instruction, as required by that decision.

At its core, therefore, this is an ordinary merits appeal in search of an extraordinary rationale—and that rationale is wrong on the merits. The petition should be denied.

STATEMENT OF THE CASE

The State's petition for certiorari misstates key aspects of the factual and procedural record.[2] The following sections provide the Court with critical information that the State omitted from its petition.

A. The dearth of evidence against Ray

Ray was one of several people charged and convicted of participating in a March 25, 2000, retaliatory shoot-out on North 29th Street in Milwaukee, Wisconsin. Pet. App. A30-38. Ray was charged with being a member of the conspiracy that led to the shooting, which injured Tenifa Jones and Jermaine Savage, and resulted in the death of Rita Martinez. *Ibid.*

The principal issue at trial was whether Ray had withdrawn from the conspiracy, or whether he was on 29th Street at the time of the shooting. Ray admitted to (1) being at a house on 33rd Street, where everyone discussed whether to go down to 29th Street to find the men who had previously shot at them; (2) picking

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[2] The complete trial transcript in this case was submitted to the Seventh Circuit Court of Appeals pursuant to a consent motion, and the Seventh Circuit took judicial notice of the transcript. See Dkts. 25 and 28.

up a gun; and (3) leaving with a group of people who were heading to 29th Street. Dkt. 25 at SA-698-719. But Ray also consistently maintained that he withdrew from the conspiracy before reaching the location of the shooting. *Ibid.* Upon changing his mind, he withdrew by telling his friends that he was not going with them—and turning around and returning to the house on 33rd Street. *Ibid.*

The prosecution had no physical evidence or eyewitness testimony placing Ray on 29th Street. Although the police obtained extensive physical evidence about the shooting, none of the guns used in the shooting was ever recovered—let alone linked to Ray. Dkt. 25 at SA-142, SA-835, SA-888, SA-894, SA-903.

Nor did the prosecution have any witnesses who "could place Ray at the scene of the shootings," much less "with a weapon in his hand." Pet. App. A7; see also Dkt. 25 at SA-902. The prosecution presented three witnesses who supposedly could testify about what happened on the night in question, but none of the three witnesses actually went to 29th Street. Furthermore, at trial, all three witnesses recanted key parts of their prior statements to police. Dkt. 25 at SA-209-246, SA-367-387, SA-493-494, SA-498.

B. The out-of-court statements of co-actors placing Ray at the scene of the crime

The State had only one piece of evidence placing Ray at the scene of the crime: the out-of-court statements of his co-actors, which were the product of custodial interviews with the police. But those co-actors, Myles and Townsend, were not called to testify. Instead, their out-of-court statements were relayed through the testimony of Detective Phillips,

who described reading them to Ray during police questioning.

According to Detective Phillips' testimony, "*Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.*" Pet. App. A14-15, Dkt. 25 at SA-653 (emphasis added). First, he was "*confronted with statements*" by Myles that "*Ray was shooting a nine-millimeter on 29th Street.*" *Ibid.* And second, he was confronted with statements by Townsend, placing Ray on 29th street with "*a .45-caliber pistol.*" *Ibid.*

These out-of-court statements of Ray's co-actors were the only testimony placing Ray at the scene of the crime.

C. The State's use of co-actors' out-of-court statements at trial

With no direct evidence, the prosecution built its case on circumstantial evidence, detailing who was involved in the initial conspiracy and presenting facts about the victims.

The prosecution also staked its case on Myles' and Townsend's statements. The State presented the jury with extensive information about Myles and Townsend. The jury was told what each looked like, what their nicknames were, how they fit into the conspiracy, and which guns they picked up from the house on 33rd Street. Dkt. 25 at SA-142, SA-345.

But neither of them was called to testify. Instead, after establishing that Myles and Townsend were central players in the shooting, the State proceeded to introduce their out-of-court statements,

placing Ray on 29th Street with them, and with a gun.

As noted, the prosecutors introduced these statements through the testimony of Detective Phillips. And although they purported to introduce the statements only to show Ray's reaction to them, they did not merely explain that Ray had been confronted with statements. Instead, they introduced the statements verbatim—as established fact. Dkt. 25 at SA-653. Nor was the jury even given a limiting instruction directing it not to use Myles' and Townsend's statements as fact.

In its closing argument, the State returned to its best evidence: the statements of Myles and Townsend. See, *e.g.*, Dkt. 25 at SA-866 ("[T]hey tell him that Miriam Miles [sic] says you're out there with a 9 [millimeter], Sylvester Townsend says you had a .45[.]"); *Id.* at SA-868 ("Hey, there's other guys here who are saying you were present on North 29th Street shooting"). The prosecutor repeatedly reminded the jury that Ray was *confronted* by Myles' and Townsend's statements. See, *e.g.*, Dkt. 25 at SA-869 ("[The police] *confront* him with Black's statement, Miriam Miles' and Slick's statements about having guns"); *Id.* at SA-901 ("[Ray is] *confronted* ... [Detective Phillips] said that people said you're out there shooting, said ... they get more specific, when the police *confront* him with a little more information about what happened.").

Thus, although the prosecutor went on to mention Ray's reaction, the jury was told that two named co-actors who never testified placed Ray on 29th Street with them, shooting a gun.

D. Proceedings below

On direct appeal to the Wisconsin Court of Appeals, Ray argued that the trial court improperly allowed into evidence statements by non-testifying co-actors, obtained during custodial interrogations, that provided the only direct evidence that he was at the scene of the crime and firing a gun. Citing *Lee* v. *Illinois*, 476 U.S. 530, 539-46 (1986), the court acknowledged that "[a] defendant's constitutional right to confrontation may be violated if a co-actor's confession is admitted at trial as substantive evidence of the defendant's guilt, the co-actor does not testify at trial, and the co-actor's confession is not sufficiently reliable to warrant its uncross-examined admission into evidence against the defendant." Pet. App. A33. But the court declined to apply the holding of *Lee* to reverse. Instead, the state appeals court referred to *Tennessee* v. *Street*, 471 U.S. 409 (1985), which held that a co-conspirator's confessions may in some circumstances be admitted, provided they are not introduced as substantive evidence and are subject to a limiting instruction. But the state appeals court did not explain why the holding of *Street* applied here. Instead, the court simply asserted that "[c]learly" the statements "were not hearsay" because they were offered "to show Ray's reaction to *his co-actor's statements placing him at the scene, shooting a gun.*" Pet. App. A33-35 (emphasis added).

After the Wisconsin Supreme Court denied review, Ray filed a federal habeas petition. And the district court certified to the Seventh Circuit the question whether "the trial court's admission of the statements by non-testifying co-actors through the

testimony of the detective ran afoul of the confrontation clause." Pet. App. A4.

In a thorough opinion applying the AEDPA standard, the Seventh Circuit found that the state court's conclusion that the co-actors' statements were introduced merely "to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun" was an unreasonable application of clearly established federal law.[3] Pet. App. A6-8. After a close review of the record, the court emphasized that there were no witnesses who "could place Ray at the scene of the shootings, with a weapon in his hand." *Id.* at A7. The Seventh Circuit also found that "the evidence presented by the prosecution delivered to the jury statements by named co-actors, not available for cross examination, accusing Ray of the very crimes with which he stood charged." *Ibid.* The court found it implausible to believe that the statements were not offered for this purpose. Accordingly, the introduction of the evidence "was a clear violation of Ray's constitutional right of confrontation." *Ibid.*

The Seventh Circuit then applied this Court's settled decisions in *Ohio* v. *Roberts* and *Lilly* v. *Virginia*, which established that statements of non-testifying witnesses against an accused may be admitted without cross-examination only if the evidence "falls within a firmly rooted hearsay exception" or if it contains "particular guarantees of

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[3] The Seventh Circuit panel issued a unanimous opinion granting Ray habeas relief. Subsequently, the Seventh Circuit denied the State's petition for rehearing and rehearing *en banc*, and the panel issued an amended opinion. Where we refer to the panel's opinion in this brief, references are to the amended opinion.

trustworthiness." Pet. App. A8-10; see *Roberts*, 448 U.S. at 65-66 (1980); see also *Lilly*, 527 U.S. at 124-125 (1999). The court found that the co-actors' statements did not fall within a hearsay exception, or contain particularized guarantees of trustworthiness. Pet. App. A9. Indeed, the government did not argue to the contrary. Accordingly, the court found that admission of the co-actors' statements was a clear violation of *Roberts* and *Lilly*. *Id.* at A8-10.

Finally, the Seventh Circuit applied the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993), and found that the error in admitting the co-actors' statements was not harmless because "Ray was not able to cross-examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the conspiracy." Pet. App. A10. As the court concluded, the "confrontation clause violation seriously affected the fairness of the judicial proceedings."[4] *Ibid.*

REASONS FOR DENYING THE PETITION

I. Because The Seventh Circuit's Decision Accords With Decisions Of Other Circuits, Petitioner Does Not Even Attempt to Identify A Circuit Split.

At the outset, it merits emphasis that the State does not even attempt to allege a conflict between the

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[4] Although the State raised a procedural default argument for the first time in its petition for rehearing and rehearing *en banc*, the State's petition to this Court does not dispute that Ray's Confrontation Clause claim was preserved and was properly before the Seventh Circuit. *See* Pet. App. A10.

Seventh Circuit's decision and that of any other circuit or state court. That is unsurprising, as we are aware of no decisions declining habeas relief in situations similar to this case.

To the contrary, the Seventh Circuit is in accord with many other circuits that have granted habeas relief in similar circumstances. Indeed, several circuits have specifically applied *Roberts* and *Lilly* in reversing lower-court rulings that similar out-of-court statements were not hearsay, and in holding that the introduction of such statements violated clearly established law. See, *e.g.*, *Ryan* v. *Miller*, 303 F.3d 231, 247 (2d Cir. 2002) ("Thus, accusatory assertions introduced without the testimony of the accuser not only violate the Confrontation Clause, but they also violate rules against hearsay."); *Jones* v. *Cain*, 600 F.3d 527, 536 (5th Cir. 2010) ("The State argues that Artberry's recorded statements were properly admitted as non-hearsay pursuant to Louisiana Code of Evidence. ... The district court correctly found all the elements of a Confrontation Clause violation under the applicable *Ohio* v. *Roberts* standard."); *Stallings* v. *Bobby*, 464 F.3d 576, 578-81 (6th Cir. 2006) ("Stallings contended that a hearsay statement by Alexander Quarterman, an acquaintance of Stallings, accusing Stallings of illegal possession of drugs and firearms was introduced at trial in violation of the Supreme Court's holding in *Lilly* v. *Virginia*. ... We agree and, therefore, find it necessary to reverse the district court's denial of relief."); *United States* v. *Chapman*, 345 F.3d 630, 632-35 (8th Cir. 2003) ("Mr. Chapman asserts that Mr. Barron's statements to Agent Scheer were inadmissible hearsay, and that their admission violated his rights under the confrontation clause of the sixth

amendment. We agree with both of these contentions ... [W]e believe the result in *Lilly* bars the admission of Mr. Barron's statements against Mr. Chapman on confrontation-clause grounds."); *Stevens* v. *Ortiz*, 465 F.3d 1229, 1231 (10th Cir. 2006) (Applying *Lilly* and holding that "the reasoning of the Colorado Supreme Court was contrary to clearly established federal law, and the introduction of the accomplice confession violated Mr. Stevens's rights under the Confrontation Clause."); *Brown* v. *Dugger*, 831 F.2d 1547, 1552 (11th Cir. 1987) (holding that the statement of an alleged accomplice introduced through a police officer's testimony was hearsay and "constituted a constitutional violation of petitioner's right to confrontation" under *Roberts*).

In all of these cases, the circuit courts reviewed the record and applied the clearly established law of *Roberts* and *Lilly* to the particular facts of each case. In each case, the substantive impact of the statements from non-testifying witnesses or co-actors was apparent from the record. And in each case, the use of those statements amounted to a Confrontation Clause violation. This was true, moreover, even where the government purported to offer the statements for other, albeit implausible, purposes. The Seventh Circuit's decision followed the same approach and reached the same conclusion based on an application of *Roberts* and *Lilly* to the particular facts of this case. There is no conflict for this Court to resolve.

II. This Case Arises From A Dead Doctrine, And Thus Presents No Question of Ongoing Significance

As we have shown, the lower courts are in agreement over both the basic legal framework that governs this case and its application to similar facts. But even if the lower courts *were* divided over the application of cases such as *Roberts* and *Lilly*, certiorari would not be warranted. Those cases were superseded by this Court's 2004 decision in *Crawford*. Thus, the decision below is part of a small (and shrinking) class of habeas cases arising under the pre-2004 standard, and the question presented is not sufficiently recurring to warrant review.

In *Crawford*, this Court overruled the reliability test of *Roberts* and held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination." *Crawford*, 541 U.S. at 68. Under the rule of *Crawford*, co-conspirator statements such as those allegedly made by Myles and Townsend to police are clearly testimonial, and their admission without cross-examination would violate the Sixth Amendment right to confrontation.

Ray's conviction, however, was finalized less than six months before *Crawford* was decided, requiring that it be analyzed under pre-*Crawford* law. That law is the law of *Roberts* and *Lilly*. See *Bintz* v. *Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005); see also *Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007).

As a result, this case is *sui generis*. It is one of a handful of collateral review cases that are still subject to the *Roberts* regime. Because all new

habeas cases are reviewed under *Crawford*, this case implicates a dead area of law. Therefore, even if this case presented the Court with a compelling reason for certiorari, which it does not, any decision would have an extraordinarily limited impact. Moreover, because this case comes to the Court on habeas review, it is a poor vehicle for developing the Court's Confrontation Clause jurisprudence.

III. The Seventh Circuit Properly Applied Clearly Established Law To The Particular Facts Of This Case

As we have explained, this case raises no circuit split and presents this Court with no issues of lasting or recurring significance. That is reason enough to deny certiorari. But even if this Court were to consider certiorari purely for error-correction, there would be no basis to grant certiorari. Even under the highly deferential standard applied in AEDPA cases, this was not a hard case.

Under pre-*Crawford* doctrine, the law applicable to Ray's Confrontation Clause claim is clearly established and undisputed. To be sure, the State is correct that "*Street* is the applicable Supreme Court case on Confrontation Clause claims pertaining to co-actors' extrajudicial statements that *are not hearsay*." Dkt. 39 at 7 (emphasis added). But extrajudicial statements that *are* hearsay are governed by *Roberts* and *Lilly*. See *Roberts*, 448 U.S. at 66; *Lilly*, 527 U.S. at 134-37. The state does not dispute that this is the clearly established standard for hearsay. And under the *Roberts* and *Lilly* standard, where extrajudicial hearsay statements are used against a defendant, he is "denied his constitutional right of confrontation." *Bruton* v. *United States*, 391 U.S. 123, 127-28 (1968);

see also *Roberts*, 448 U.S. at 66 (permitting only those hearsay statements that fall within a firmly-rooted hearsay exception or contain particular guarantees of trustworthiness).

Indeed, the constitutional violation is all the more egregious—and the law all the more clearly established—where prosecutors use statements of a defendant's co-actors. As this Court explained in *Lilly*, out-of-court co-actor confessions are "presumptively unreliable" because it is "highly unlikely" that "confessions that shift or spread blame can be effectively rebutted" without cross-examination. *Lilly*, 27 U.S. at 137. After all, "the government is involved in the statements' production," and the statements "describe past events" that "have not been subjected to adversarial testing." *Ibid.* In these circumstances—the circumstances of this case—this Court has warned that the Confrontation Clause's truth-finding function is "uniquely threatened." *Lee*, 476 U.S. at 541. The Court has had no hesitation in holding that such statements are constitutional violations. See *ibid.* (holding that introduction of accomplice's confession violated Confrontation Clause); *Bruton*, 391 U.S. at 127-28 (same); *Lilly*, 27 U.S. at 137 (same).

In light of the clearly established law, the key question for the Seventh Circuit was whether the co-actor statements of Myles and Townsend were hearsay—*i.e.*, whether they were out-of-court statements establishing that Ray was at the scene of the crime. And as we explain below, the Seventh Circuit properly found that even under the most deferential standard of review for AEDPA decisions, the statements of Myles and Townsend were hearsay

and functioned as substantive evidence against Ray. In the context of the evidence presented in this case, no other conclusion is plausible. But again, even if the court of appeals had erred in this regard, certiorari would not be warranted to address the question of whether the particular statements at issue qualified as hearsay. The law governing that question is well-settled.

A. The Seventh Circuit's decision was compelled by the clearly established law of *Roberts* and *Lilly*.

The State's entire case depended on the statements of Miriam Myles and Sylvester Townsend. Because Myles' and Townsend's statements were hearsay, the Seventh Circuit properly applied the clearly established law of *Roberts* and *Lilly* to the facts of this case, finding that admission of those out-of-court statements violated the Confrontation Clause.

1. Myles' and Townsend's out-of-court statements had an obvious hearsay purpose.

The Seventh Circuit was right to conclude that the introduction of Myles' and Townsend's statements to the jury had an obvious hearsay purpose.

The main issue at Ray's trial was whether he was at the scene of the crime on 29th Street when the shooting occurred. Ray consistently testified that he withdrew from the conspiracy at issue and was not at the scene of the crime. Dkt. 25 at SA-698-719. As noted above, moreover, no physical evidence placed Ray at 29th Street, and no witnesses "could place Ray at the scene of the shootings, with a weapon in his hand." Pet. App. A7.

As a result, the only evidence placing Ray at the scene of the crime was the statements of Ray's two co-actors. Both statements were read to the jury by Detective Phillips as part of the State's case-in-chief. Detective Phillips testified that "Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray." Dkt. 25 at SA-41-42, SA-653. Shortly thereafter, the jury heard that Ray was confronted with statements by Myles "that *Ray was shooting a nine-millimeter on 29th Street*" and by Townsend "that *Ray had a .45-caliber pistol.*" *Ibid.* (emphasis added).

Later at closing, the prosecutor returned to the statements of Myles and Townsend, telling the jury that "Miriam Miles [sic] says you're out there with a 9, Sylvester Townsend says you had a .45." Dkt. 25 at SA-866, SA-869. These references to Myles' and Townsend's statements during closing treated Myles and Townsend as if they were witnesses and reminded the jury that two named co-actors had placed him at the scene of the crime. In light of the record, it is obvious that Myles' and Townsend's statements established a vital "missing link" in the prosecution's case: placing Ray at the scene of the crime. And for that purpose, the out-of-court statements were plainly hearsay.

2. *Roberts* and *Lilly* require exclusion of the statements.

Myles' and Townsend's statements are exactly the types of statements that *Roberts* and *Lilly* prohibit. Both statements were produced while in police custody, described previous events, and were not subject to any cross-examination at trial. The

Seventh Circuit found that because the statements by Myles and Townsend did not "fall within a firmly rooted hearsay exception" and also did not contain "particularized guarantees of trustworthiness," they were inadmissible. Pet. App. A8-A9 (citing to *Roberts*, 448 U.S. at 65-66; *Lilly*, 527 U.S. at 124-25).

In addition, both statements implicate Ray in the shooting. Yet, as the Court warned in *Lilly*, "accomplices' confessions that shift or spread blame" trigger "core concerns" when they "have not been subjected to adversarial testing." *Lilly*, 527 U.S. at 137.

As the Seventh Circuit put it, "Ray was not able to cross examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the conspiracy at issue."[5] *Ibid.* This was a clear violation of *Roberts* and *Lilly*.

B. The Seventh Circuit properly found that it was unreasonable under AEDPA to apply *Street* instead of *Roberts* and *Lilly*.

Although *Roberts* and *Lilly* plainly prohibit introduction of co-actor hearsay as substantive evidence, the petition rests on the proposition that there was no Confrontation Clause violation because "Ray's claim was similar to the claim presented to this court in *Tennessee* v. *Street*, 471 U.S. 409 (1985)." Pet. 11. But in fact, it is not similar at all.

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[5] For the same reason, the Seventh Circuit properly held that admitting Myles' and Townsend's statements was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. App. A10.

The premise of the State's argument—that the out-of-court statements of Ray's co-actors were not hearsay—cannot reasonably survive scrutiny. And the conclusion that *Street* controls is equally unsound. In these circumstances, it was wholly appropriate under AEDPA for the Seventh Circuit to hold that the state court had unreasonably applied *Street*.

1. The Seventh Circuit rightly found it unreasonable to believe that the out-of-court statements were not hearsay.

Ignoring the record, the State's petition simply repeats the assertion that Myles' and Townsend's statements placing Ray at the scene of the crime were actually introduced to show Ray's "reaction" to being implicated in the shooting. Pet. 10. Specifically, the State cites to Ray's statement at the end of the interview, "[T]ell me which gun killed the girl and I'll tell you everything." *Ibid.* But the Seventh Circuit, upon review of the record, correctly determined that proof of Ray's *reaction* did not require admitting the *co-actor confessions* that preceded them. Even if Ray's reaction was probative and admissible, the reason for admitting the reaction did not supply a plausible—much less, persuasive—non-hearsay reason for admitting the confessions. Although admitting these out-of-court statements was the only way for prosecutors to place Ray at the scene of the crime, it was *not* necessary to accomplish their purported non-hearsay purpose. The State's argument for admitting these statements was no more than a transparent pretext.

If the State's purpose in introducing the statements was to suggest that Ray's reaction at the

end of his interview revealed that he was really on 29th Street, all it needed to do was introduce the part of the statement that showed Ray's reaction. That portion of Ray's statement was completely severable from the co-actor statements at issue in this case. Indeed, at oral argument the Seventh Circuit asked the State to explain why the statements could not be severed, but the State had no answer. And after three rounds of briefing, the State has never explained why Ray's reaction could not have simply been shown by sharing the final statement "tell me which gun killed the girl and I'll tell you everything" with the jury. Pet. App. A3. And as this Court has long held, "[w]here viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice." See *Bruton*, 391 U.S. at 134.

Prosecutors easily could have asked Detective Phillips about Ray's offer of help at the end of his interview without mentioning to the jury that two of Ray's co-conspirators, who had been named and identified earlier in the trial, actually placed Ray at the scene of the crime with a weapon. But the State did not do that. Instead it relied on Detective Phillips to introduce verbatim the critical statements of Myles and Townsend to the jury; and as the record shows, that evidence placing Ray at the scene of the crime was not available from any other source.

The State also claims that Myles' and Townsend's statements were not introduced for their truth because they are "inconsistent with one another." Pet. 11. According to the State, because Myles placed Ray on 29th Street with a 9mm and Townsend placed him on 29th Street with a .45, the jury would simply ignore both statements as untrue. The jury, in the

State's view, would have known on its own—without being instructed—that the statements were not being used to establish the truth of the matter asserted.[6] This argument fails to withstand scrutiny.

As noted earlier, Ray was charged with being part of a conspiracy. Accordingly, the only thing the prosecutor had to prove was that Ray was present at the scene of the crime on 29th Street. It did not matter which gun Ray was carrying, or even if he had a gun, because the police never recovered any of the guns that were involved in the shooting. On the only point that mattered for conviction, the statements were consistent: They both unequivocally placed Ray on 29th Street, the scene of the crime. And those two statements were the only evidence establishing that critical fact.

The jury may well have believed that Myles and Townsend saw Ray at the scene of the crime, even if they did not see him well enough to correctly identify the gun he was carrying. But Ray was not given any

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[6] Remarkably, the State was not even sure at oral argument whether the out-of-court statements are accurate, or whether they were instead manufactured by the officer who used them to confront Ray. See Oral Argument Audio Recording, available at: http://www.ca7.uscourts.gov/tmp/-1V192RDR.mp3 ("Well, first of all, I'm not even sure that those statements were made. I mean, for all I know, Detective Phillips was using this as some sort of police interrogation technique."). If they were in fact manufactured by the officer, prosecutors could have brought out at trial that they were *false*. But prosecutors did not do so, and instead allowed the jury to draw the conclusion that the statements had actually been made.

opportunity to cross-examine them about these inconsistencies.

Under these circumstances, Myles' and Townsend's statements could not plausibly be thought to prove only Ray's reaction. They were not even needed to prove his reaction. And in light of the critical void in the prosecution's case conveniently filled by these statements, they had an obvious hearsay purpose. As the Seventh Circuit noted, "to accept the government's position that the statements were offered only to create the setting for Ray's response, and therefore admissible, would set the stage to eliminate, in most cases the confrontation right enjoyed by the accused." Pet. App. A7.[7]

2. The statements in this case were nothing like those for which this Court made an exception in *Street*.

On the mistaken assumption that the prosecutors had a valid nonhearsay purpose for introducing the statements at issue, the State claims that the court of appeals should have applied *Street*. But that argument lacks merit.

In *Street*, this Court acknowledged the general rule of *Roberts* and *Lilly* but held that out-of-court statements do not raise Confrontation Clause

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[7] The State's position appears to be that any claimed nonhearsay purpose, however implausible, suffices to make an out-of-court statement admissible simply because prosecutors assert it. But the law has never permitted such an approach to hearsay. The State's position would immunize constitutional error from review, by allowing the limited exception of *Street* to eviscerate the protection of the Confrontation Clause.

concerns if—and only if—they are not substantive evidence proving the truth of the matter asserted (*i.e.*, if they are not hearsay). *Street*, 471 U.S. at 414. Thus, the Court explained, the "nonhearsay aspect of Peele's confession—*not to prove what happened at the murder scene* but to prove what happened when respondent confessed—raises no Confrontation Clause concerns." *Ibid.*

There was no plausible reason in *Street* to believe that the out-of-court statements were substantive evidence of what happened at the murder scene. The issue at trial was whether the defendant's own confession had been coerced, and that issue depended on whether he had been pressured to repeat the confession of his co-actor, Peele. 471 U.S. at 414. The defendant, moreover, opened the door to discussion of his co-actor's confession by testifying that police "read from Peele's statement and directed him to say the same thing." *Id.* at 411. In these circumstances, it was obvious that the relevance of the co-actor confession was to rebut the *defendant's testimony about the contents of that very confession* by showing that it did not contain "the same thing" as the defendant's confession.

For that reason, this Court found the situation in *Street* to be "significantly different" from cases such as *Roberts*. *Id.* at 413. And for the same reason, it is significantly different from this case. Here, Ray did not testify at all about the content of Myles' and Townsend's confessions. Rather, the issue at trial—indeed, the critical void in the prosecution's case—was what happened at the murder scene. And Myles' and Townsend's statements were offered not in response to a claim of coercion, but as part of the State's case-in-chief. Pet. App. A7. While there was

every reason in *Street* to believe that the statement at issue was not used "to prove what happened at the murder scene" (*id.* at 414), here there is every reason to believe the opposite.

Not only does *Street*'s exception to the general rule of *Roberts* and *Lilly* not apply here, but the trial court in this case did not even satisfy what the Court in *Street* considered to be a necessary prerequisite for such an exception—a limiting instruction to the jury. As the Court there explained, "[i]f the jury had been asked to infer that Peele's confession proved that respondent participated in the murder, then the evidence would have been hearsay." *Id.* at 414. But there was no concern about such an inference in *Street*, because the jury was twice "pointedly instructed" that it was "'not to consider the truthfulness of [Peele's] statement in any way whatsoever.'" *Id.* at 414-15 (quoting instruction). Thus, the question before the Court in *Street* was "reduced to whether" jurors could be trusted to "follow[] the instructions given them by the trial judge." *Id.* at 415 (quotations omitted). The Court concluded that they could be trusted. Here, by contrast, the trial judge did not give the jury any curative instruction.[8] Pet. App. A8. Therefore, the question is whether, in the absence of an instruction, a co-actor statement about what happened at the

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[8] Although the State attempts to suggest that Ray's trial counsel did not properly object to admission of the confessions, the state court reached the merits of Ray's Confrontation Clause claim and the State failed to make any procedural default argument on appeal. The Seventh Circuit thus properly deemed the argument waived. Pet. App. at A10; see *Lilly v. Gilmore*, 988 F.2d 783, 784-85 (7th Cir. 1993).

scene of the crime is allowed. Under *Roberts* and *Lilly*, it is not.

3. AEDPA did not require the Seventh Circuit to apply *Street* where it was unreasonable to do so.

In light of the foregoing, it is not surprising that the Seventh Circuit would find this case to be nothing like *Street* and instead to involve a straightforward application of *Roberts* and *Lilly*. Pet. App. at A7. Nor is there any question, under AEDPA, that the state court acted unreasonably in concluding otherwise. As this Court noted in *Panetti v. Quarterman*, a federal court is permitted to find an application of a legal principle "unreasonable" under AEDPA when the case before it involves a set of facts "different from those of the case in which the principle was announced." 551 U.S. 930, 953 (2007) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). The Seventh Circuit did no more than that here.

In response to the decision below, the State claims that the inapplicability of *Street* is somehow not clearly established. Pet. 14. But *Street* is the exception; *Roberts* and *Lilly* are the rule; and the clearly established rule of *Roberts* and *Lilly* obviously applies where the exception does not. By ignoring the absence of any limiting instruction, among other factors, the State's petition in fact attempts to carve out a wider exception to *Roberts* and *Lilly* than *Street* actually created.

AEDPA "recognizes . . . that even a general standard may be applied in an unreasonable manner," meriting issuance of the writ. *Panetti*, 551 U.S. at 953. Far from announcing some "general standard," this Court in *Street* made a narrow

exception to the rule of *Roberts* and *Lilly*. AEDPA does not permit states to read that narrow exception generally, and then unreasonably apply it.

CONCLUSION

In sum, the petition satisfies none of the traditional criteria for certiorari. The decision below does not present any unresolved issue of law, and the petition does not demonstrate any conflict of authority among the lower courts, or with any decision of this Court. Indeed, the petition does nothing more than quibble with the application of settled law to the particular facts of this case.

The petition should be denied.

Respectfully submitted.

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No. 10-31

In The

Supreme Court of the United States

ANA BOATWRIGHT,

Petitioner,

v.

ELLIOT D. RAY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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28 U.S.C. § 2254(d)(1) 1

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1), prohibited the United States Court of Appeals for the Seventh Circuit from holding that the Wisconsin state court's application of *Tennessee v. Street*, 471 U.S. 409 (1985), was contrary to, or an unreasonable application of, federal law. Here, because the Seventh Circuit wholly failed to apply AEDPA standards to the state court decision at issue, the court exceeded its authority under federal law.

I. THIS COURT'S REVIEW OF VIOLATIONS OF AEDPA STANDARDS DOES NOT DEPEND ON A SPLIT AMONG THE CIRCUITS NOR ON A MATTER OF "ONGOING SIGNIFICANCE."

Ray urges the denial of the petition for certiorari because the circuits have not split on the legal issue in this case and this case is *sui generis*.[1] (Br. in Opp. at 8-12).

Neither a circuit split, nor an inquiry into how many parties would be affected by a decision, is a prerequisite for this Court to grant certiorari in an

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[1] The State disagrees with Ray's assertion that "all new habeas cases are reviewed under *Crawford* [*v. Washington*, 541 U.S. 36 (2004)]. The State frequently responds to habeas petitions in which the prisoner's conviction was final before *Crawford*. Properly filed postconviction motions toll the AEDPA limitations period, making pre-*Crawford* cases not uncommon.

AEDPA case. This Court has repeatedly granted certiorari when federal appellate courts have declined to abide by the limitations set forth in AEDPA, regardless of whether the federal circuit courts have split on the underlying legal issue or on whether a great number of parties would be affected by a decision. *See, e.g., Schiro v. Landrigan*, 550 U.S. 465 (2007); *Rice v. Collins*, 546 U.S. 333 (2006); *Bradshaw v. Richey*, 546 U.S. 74 (2005) (*per curiam*); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Woodford v. Viscotti*, 537 U.S. 19 (2002) (*per curiam*); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Bell v. Cone*, 535 U.S. 685 (2002).

Ray argues that not only is there no circuit split on the issue in this case, but the Seventh Circuit's decision "is in accord with many other circuits that have granted habeas relief in similar circumstances" (Br. in Opp. at 9). Ray then cites to several cases in which federal appellate courts, like the Seventh Circuit, have examined confrontation clause issues applying *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Lilly v. Virginia*, 527 U.S. 116 (1999) (Br. in Opp. at 9-10). None of the cases that Ray cites appear to involve federal review of a state court decision that

relied upon *Street* in reviewing a defendant's confrontation clause claim.[2] The issue in this case is not whether the statements could be admitted under *Roberts* or *Lilly*, but whether the state court's application of *Street* ran afoul of § 2254(d)(1). *See, e.g.*, *Furr v. Brady*, 440 F.3d 34, 37-39 (1st Cir. 2006) ("The state appellate court's interpretation and application of *Street* to the Furr case readily passes muster under § 2254(d)(1)").

Ray also argues that this Court should deny certiorari because his case involves "dead doctrine" (Br. in Opp. at 11). This argument ignores the fact that the State is not asking this Court to grant certiorari to develop or clarify confrontation clause law. The State asks this Court to grant certiorari because the Seventh Circuit, like the circuit courts in this Court's cases listed *supra*, failed to comply with AEDPA's limits on federal power.

Despite the well-known circumstances under which a federal court may grant habeas relief, the Seventh Circuit ignored the mandates of AEDPA and refused to offer any deference to the state court's application of federal law. Instead of analyzing how the state court reached its decision finding Ray had failed to show plain error, the Seventh Circuit determined that the state court's analysis was unreasonable because the federal case on which the

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[2] *Brown v. Dugger*, 831 F.2d 1547, 1551 (11th Cir. 1987), concluded that the State's *Street* argument, made for the first time on appeal, did not satisfy the confrontation clause because at trial, the prosecution admitted the statements for their truth and had relied upon the them for their truth.

state court relied was "distinguishable" from Ray's case.

AEDPA creates a highly deferential standard for federal review of state-level criminal convictions and further identifies this Court's interpretations of federal law as the benchmarks for implementing that standard. *Renico v. Lett*, 130 S. Ct. 1855, 1862 n.1, 1865-66 (2010). Here, the Seventh Circuit substantially disregarded those strict standards. That disregard warrants this Court's review.

II. THE SEVENTH CIRCUIT FAILED TO COMPLY WITH AEDPA'S STANDARDS FOR REVIEWING A STATE COURT'S ADJUDICATION OF A CRIMINAL CASE.

Ray's argument that Myles' and Townsend's "statements were plainly hearsay," misses the point at issue (Br. in Opp. at 15). Before granting habeas relief, AEDPA requires a federal court to show how the state court unreasonably applied a clearly established federal law as determined by this Court,

or how the state court decision was contrary to federal law.[3] The Seventh Circuit failed to do so.

A. Ray Mischaracterizes The Facts Of His Case.

As a preliminary matter, the State asserts that Ray's statement of the case and argument mischaracterize the facts in this case. The State seeks to clarify these misstatements.

1. Ray states that he has "consistently maintained that he withdrew from the conspiracy" (Br. in Opp. at 3). This is not true. For approximately the first thirty to sixty minutes of his interview with police, Ray denied any knowledge of the crime whatsoever (Dkt. 25 at SA641-42). Later, he told police, "Tell me which gun killed the girl and I'll tell you everything" (Dkt. 25 at SA653).

2. Ray states that no limiting instruction was given with regard to Phillips' testimony (Br. in Opp. at 5). While technically true, Ray fails to mention that he made no contemporaneous

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[3] It is not clear whether the Seventh Circuit found the state court decision contrary to federal law or an unreasonable application of federal law. In determining whether there was a confrontation clause issue, it appears the court concluded that the state court unreasonably applied federal law (A7). However, in the court's closing remarks, the court stated that the confrontation clause violation "resulted in a decision that was contrary to clearly established federal law" (A10). Under either standard, the State maintains that the Seventh Circuit misapplied AEDPA and exceeded its authority in doing so.

objection to the testimony, nor did he request a limiting instruction.

3. Ray states that "[i]n its closing argument, the State returned to its best evidence: the statements of Myles and Townsend" (Br. in Opp. at 5). While the State's closing arguments mentioned Myles' and Townsend's statements, they were clearly mentioned only to emphasize Ray's reaction to them. The closing argument is clearly centered around Ray's own inculpatory statements, which appear to place him at the scene of the crime (Dkt. 25 at SA865 ("Tell me which gun killed the girl"); SA866 ("Tell me which gun killed the girl, and I'll tell you everything"); SA869 ("Tell me which gun killed the girl, and I'll tell you everything")).

4. Ray states that there was a "dearth of evidence against" him (Br. in Opp. at 2). He argues that Myles' and Townsend's statements were the only evidence that placed him at the scene of the crime (Br. in Opp. at 19). This is not true. Ray's own inculpatory statements appear to place him at the scene, as well.[4]

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[4] It is strange that Ray argues that there was no evidence that placed him at the scene of the crime when his own statements certainly imply he was there and asserts that his statements could have been admitted as long as they were severed from Myles' and Townsend's statements (Br. in Opp. at 17-19).

B. The Seventh Circuit Decision Fails To Offer Any Level Of Deference To The State Court Decision At Issue.

Here, because Ray failed to object to Phillips' testimony at trial, the state court analyzed Ray's claim for relief under the plain error doctrine (A33). In Wisconsin, plain error review requires a defendant to show that a constitutional error occurred and the error was obvious (A33). The state court found that the case that most closely resembled Ray's case was this Court's decision in *Street*. In *Street*, this Court found that the confrontation clause is not implicated when a non-testifying co-actor's statements are admitted into evidence when those statements are not admitted for their truth. *Street*, 471 U.S. at 413-17. In this case, the state court concluded that Myles' and Townsend's statements, submitted into evidence through Phillips' testimony, were like the statements admitted in *Street* (A32-A35). The statements were not offered for their truth, but to put into context Ray's inculpatory statements in reaction to them (A33-A35). Because the statements were not offered for their truth, they were not hearsay and did not violate Ray's confrontation clause rights (A32-A35). Therefore, the state court concluded, Ray had failed to show plain error (A35).

Not only did the Seventh Circuit fail to offer any deference to this decision, the court wholly ignored the state court's decision. In fact, the portion of the

court's decision devoted to the hearsay determination barely makes mention of the state court decision at issue (A5-A8).[5]

The Seventh Circuit failed to acknowledge that because Ray did not object to the statements at trial, the state court was compelled to review Ray's claim only for plain error. The Seventh Circuit, therefore, was required to review the state court's decision with almost a double level of deference – Ray would have to show that the state court decision finding a lack of *plain error* was contrary to, or an unreasonable application of, clearly established federal law. Instead, after paying lip service to AEDPA, the Seventh Circuit essentially reviewed Ray's claim *de novo*. Without citation to any decision from this Court, the Seventh Circuit made the conclusory finding that "the hearsay violation was beyond dispute" (A5).

The Seventh Circuit implied that the state court should have applied *Roberts* and *Lilly* to Ray's confrontation clause claim (A8-A10). Because of this, it appears that the Seventh Circuit found that the state court decision, in applying *Street*, was contrary to this Court's clearly established law.

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[5] The decision's only reference to the state court decision in this section of the opinion refers only to the State's argument in support of it (A6-A7) ("The government maintains that the state court's conclusion that the co actors' statements were introduced to give context to Ray's reaction to them (i.e., a guilty reaction), not to show their underlying truth, is a reasonable conclusion and a reasonable application of federal law").

However, the Seventh Circuit decision also states that the state court's decision was unreasonable (A7). The State argues that the state court's reliance on *Street* instead of *Roberts* or *Lilly* was neither contrary to, nor an unreasonable application of, federal law.

1. Contrary to.

Neither *Roberts* nor *Lilly* addressed the situation at issue here: whether a co-conspirator's statement can be admitted when it is not introduced for its truth, but instead to show the defendant's reaction to the statement. The clearly established federal law that addresses this question is *Street*. Therefore, the state court's decision to analyze Ray's confrontation clause claim through the lens of *Street* cannot be contrary to clearly established federal law.

The state court was presented with the question of whether Phillips' testimony ran afoul of the confrontation clause when the co-conspirators' statements contained therein were introduced not for their truth, but to show Ray's inculpatory reaction to them. The state court then looked to *Street*, the only clearly established law from this Court to address such a question. Application of *Street* in this situation is not contrary to *Roberts* or *Lilly* because *Street* is the law from this Court that most closely fits the facts of this case.

2. Unreasonable application.

The Seventh Circuit failed to address, much less demonstrate, how the state court's decision finding no plain error is an unreasonable application of *Street*. The court did not offer any guidance as to how the state court went wrong in its application of *Street*. Instead, the Seventh Circuit merely stated that *Street* was "distinguishable" from the facts in Ray's case (A7-A8). Whether a Supreme Court case is distinguishable from the facts of a state court case has little to no import in an AEDPA case.

The Seventh Circuit stated that *Street* was distinguishable from Ray's case in two ways: (1) because in *Street* the co-conspirator's statements were introduced in rebuttal and not during the State's case in chief and (2) because in *Street* the court issued a limiting instruction (A8).

First, the fact that the statements were admitted during rebuttal in *Street* was not germane to this Court's holding that the statements were not hearsay. 471 U.S. at 413-14. The statements were not hearsay because they were not admitted "to prove what happened at the murder scene but to prove what happened when respondent confessed." *Id.* at 414. Introduction of the statements to explain the defendant's reaction to the statements "raises no Confrontation Clause concerns." *Id.* The inquiry into the purpose of the admission of the statements does not turn on when the statements were admitted

during the case, but on how the statements were used.

Second, *Street* cannot be distinguished based on the fact that a limiting instruction was not given because Ray failed to request a limiting instruction. Ray did not object to the statements admission at trial, nor did he move the trial court to instruct the jury that they should consider the statements for a limited purpose.

Further, Ray attempts to distinguish *Street* contending that, unlike in *Street*, the statements in his case were used to show what happened at the murder scene (Br. in Opp. at 21). This is simply not true. The statements were admitted, without objection, to show Ray's inculpatory reaction to them. It is clear from reading the record, particularly the State's closing argument, that the emphasis was on Ray's reaction to the statements, not on the statements themselves as any sort of substantive evidence of guilt.

For these reasons, *Street* is not meaningfully distinguishable from Ray's case. Even if the case were distinguishable, however, any distinctions do not rise to the level required before a federal court can reverse a state court conviction. The state court's application of *Street*, a decision from this Court that specifically addresses when a co-conspirator's statements can be admitted to explain the defendant's reaction to them, was reasonable.

It is clear from the Seventh Circuit's decision that it declined to provide any level of deference to the state court's findings, much less the level required by AEDPA. Without any analysis of the state court's decision, the Seventh Circuit blatantly ignored the law.

C. The Seventh Circuit Mistakenly Placed The Burden On The State To Show Ray's Trial Was Error-Free.

The Seventh Circuit and Ray repeatedly place the burden on the State to show how the statements at issue do not run afoul of the confrontation clause.[6] This is not the proper standard applied to cases before federal courts in AEDPA cases. It is Ray who must show that the state court's decision is unreasonable.

In finding that *Street* is distinguishable from Ray's case, the Seventh Circuit not only failed to apply the deference required by AEDPA, but it switched the burden from Ray to show how the state court's decision was unreasonable to the State to

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[6] For example, Ray complains that "the State has never explained why Ray's" inculpatory statements could not be severed from Phillips' recitation of Myles' and Townsend's statements (Br. in Opp. at 17-18). The State is under no obligation to make such a showing because whether the statements could be severed is not at issue. Moreover, the State has no burden of proof or production in a habeas case such as this.

show how the state court's decision could be supported. This burden-shifting is impermissible and is directly contrary to the law as set forth in AEDPA. The Seventh Circuit's decision repeatedly criticizes the State for its arguments in support of the state court's decision, but fails to offer any insight into how the state court's decision was unreasonable.

The Seventh Circuit's decision is the precise type of decision that this Court has held offends AEDPA and is impermissible. *See Lett*, 130 S. Ct. 1855. Essentially, the Seventh Circuit's decision amounts to a disagreement with the state court's finding; the court substituted its opinions for the state court's reasoned findings. Based on this disagreement, the court granted Ray habeas relief. But mere disagreement with the state court's decision is not enough under AEDPA to award Ray such significant relief. The state court decision must be *contrary* to, or an *unreasonable* application of, this Court's law before a federal court can grant relief. The Seventh Circuit's opinion failed to evaluate the state court's decision with regard to this high standard.

CONCLUSION

For the foregoing reasons, as well as those in the petition, the State respectfully requests this Court grant the petition for certiorari.

Respectfully submitted,

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